

State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age

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TABLE OF CONTENTS

I. INTRODUCTION	645
II. BACKGROUND	646
III. OFF-DUTY PROTECTION STATUTES	654
A. <i>Colorado</i>	655
B. <i>North Dakota</i>	657
C. <i>New York</i>	659
D. <i>California</i>	661
E. <i>Connecticut</i>	664
IV. COMPARISON OF OFF-DUTY STATUTES	665
V. COMPETING POLICY IMPLICATIONS OF OFF-DUTY STATUTES.....	667
A. <i>Opposition to Off-Duty Protection</i>	668
B. <i>Benefits of Off-Duty Protection</i>	670
VI. PROPOSED SOLUTIONS	673
A. <i>Federal Legislation</i>	674
B. <i>Model State Statute</i>	675
C. <i>Model Act Analysis</i>	677
VI. CONCLUSION	685

I. INTRODUCTION

After graduating law school and clerking for a federal district court and the United States Court of Appeals for the Fifth Circuit, David Becker landed a job with a major international law firm.¹ Prior to his start date, David started a blog and Twitter account chronicling his last forty days before “kiss[ing] goodbye to a substantial portion of free time, extracurricular activities, personal hobbies,” and exercise.² In these forty days, David

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¹ Patrick Beach, *40 Days, 1 Pretty Quirky Things-To-Do List*, AUSTIN AMERICAN STATESMAN, Oct. 6, 2009, at A1.

² David Becker, *About, THE FORTY DAYS* (Sept. 12, 2009), <http://thefortydays.com/about> [hereinafter Becker, *About*]; David Becker, *The Forty*

described his forty unique experiences: skydiving, giving church confessional as a Jew, and performing a stand-up comedy routine.³ David's goal was to have novel experiences before the "long hours, late nights, and lots and lots of thinking, researching, and writing about the law."⁴ After the Austin American Statesman featured a story about David's blog, it was obvious that Vinson & Elkins became aware of its future employee's internet activity. If Vinson & Elkins was upset with the way David portrayed himself or his work environment, does the firm have the power to terminate his employment? The answer to this question is not clear and continues to change as states adopt off-duty conduct statutes. As internet activity expands, state legislatures should address this issue and protect off-duty conduct, rather than allow judiciaries to gradually and inconsistently shape the law.

This Note argues that state legislatures should adopt a model statute that protects private employees' off-duty conduct. First, this Note explores the increasing growth and importance of internet communication through blogs and social networking. Next, this Note examines why these forms of communication are not currently protected for private employees. There are currently five states that have off-duty protection statutes for employees, but this Note describes how state judiciaries have narrowed these statutes to preclude nearly all protection for internet activity. Last, this Note proposes a model statute that addresses the competing policy considerations for employees and employers. This model act combines elements from each of the current five off-duty protection statutes, while also adding new text to ensure protection for the increasing use of internet communication.

II. BACKGROUND

In contemporary society, social networking websites and blogging are becoming increasingly popular. As individuals continue to use the Internet to express their views and display pictures, employers are monitoring their employees' online behavior; this often results in termination.⁵ Research

Days, TWITTER, <http://twitter.com/thefortydays> [hereinafter Becker, *Forty Days*]; see Beach, *supra* note 1.

³ David Becker, *David Becker's Forty Days of Ferocious Funemployment*, THE FORTY DAYS (Oct. 27, 2009), <http://thefortydays.com/>; Becker, *Forty Days*, *supra* note 2.

⁴ Becker, *About*, *supra* note 2.

⁵ See, e.g., Marc Beja, *Judge Orders U. of Louisville Nursing Student Reinstated*, CHRON. HIGHER EDUC. (Aug. 3, 2009), <http://chronicle.com/article/Judge-Orders-U-of-Louisville/47925/>; Jeanette Borzo, *Employers Tread a Minefield*, WALL ST. J. (Jan. 21, 2011), <http://online.wsj.com/article/SB10001424052748703954004576089850685724570.html>; Jo Twist, *Blogger Grounded by Her Airline*, BBC NEWS (Oct. 27, 2004), <http://bbc.co.uk/2/hi/technology/3955913.stm> (Delta terminated a flight attendant after posting pictures of herself in uniform on her blog); Jenna Wortham, *More Employers Use*

indicates that there are over 150 million blogs, with new blogs created every second.⁶ Approximately 77% of active internet users read blogs,⁷ and the “blogosphere” doubles in size every five months.⁸ Over the last several years, social networking sites such as Facebook have also grown rapidly.⁹ There are over 500 million Facebook users, and people spend more than 700 billion minutes on Facebook each month.¹⁰ It has become so common for employers to terminate employees for their online conduct, that a new word has emerged—doocing.¹¹ Doocing—defined as an employer firing an

Social Networks to Check Out Applicants, N.Y. TIMES BITS (Aug. 20, 2009 3:27 PM), <http://bits.blogs.nytimes.com/2009/08/20/more-employers-use-social-networks-to-check-out-applicants/> (“According to a new study conducted by Harris Interactive for CareerBuilder.com, 45 percent of employers questioned are using social networks to screen job candidates—more than double from a year earlier, when a similar survey found that just 22 percent of supervisors were researching potential hires on social networking sites like Facebook, MySpace, Twitter and LinkedIn.”).

⁶ BLOGPULSE, <http://www.blogpulse.com> (last visited Apr. 11, 2011); see Anne Helmond, *How Many Blogs Are There? Is Someone Still Counting?*, BLOG HERALD (Feb. 11, 2008), <http://www.blogherald.com/2008/02/11/how-many-blogs-are-there-is-someone-still-counting/> (“The state of the Blogosphere is strong, and is maturing as an influential and important part of the web. For nearly four years, we’ve been tracking and enabling the growth of this phenomenon and [there] is much in our data to indicate that the medium is ‘growing up.’” (quoting David Sifry, *Sifry’s Alerts: The States of the Live Web*, April 2007, SIFRY’S ALERTS (Apr. 5, 2007), <http://www.sifry.com/alerts/archives/000493.html>)).

⁷ Adam Singer, *Social Media, Web 2.0 And Internet Stats*, FUTURE BUZZ (Jan. 12, 2009), <http://thefuturebuzz.com/2009/01/12/social-media-web-20-internet-numbers-stats/>.

⁸ Alan R. Nye, *Blog Wars: A Long Time Ago in an Internet, Far, Far Away . . .*, 20 ME. B.J. 102, 103 (2005).

⁹ See Monica Hesse, *Worldwide Ebb*, WASH. POST, Oct. 19, 2009, at C1 (“For users new to a social network, the site becomes a full-time addiction. There are old high school teachers to be found, old middle school tormenters to gleefully reject, groups to join and then leave. As each friend is added, there are profiles to stalk and dissect, and perfunctory ‘tell me about the last seven years of your life’ e-mails to exchange. There is the endless care and development of one’s own profile, plus the quizzes and the lists.”); Yaakov Katz, *Facebook Details Cancel IDF Raid*, JERUSALEM POST (Mar. 4, 2010), <http://www.jpost.com/Israel/Article.aspx?id=170156> (A raid into the West Bank by the Israeli Defense Force was halted due to a soldier’s Facebook status which compromised the operation. “The soldier, who had updated his Facebook page with his cellular phone, was disciplined by his commander, sentenced to 10 days in jail and kicked out of his unit.”).

¹⁰ Facebook Press Room, Statistics, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Nov. 16, 2010).

¹¹ BuzzWord, MACMILLAN ENGLISH DICTIONARY, <http://www.macmillandictionary.com/buzzword/entries/dooced.html> (last visited Apr. 11, 2011); see, e.g., Stephen D. Lichtenstein & Jonathan J. Darrow, *Employment Termination*

employee for the employee's internet posts—is increasingly common as the blogosphere expands.

The Supreme Court recently confronted the issue of whether public employees have a reasonable expectation of privacy for communications on government-owned electronic equipment.¹² Although this decision does not directly address this Note's focus on private employees' off-duty protections, the Supreme Court's analysis on employee privacy has potentially widespread implications for how courts interpret electronic privacy statutes. The Court recognized the potential "to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees"¹³ The Court recognized that the increasing use of electronic communication broadens what society deems acceptable, and it may also become a "necessary instrument[] for self-expression, even self identification."¹⁴ To the dismay of many, however, the Court ruled on narrower grounds to avoid establishing standards for privacy in an emerging field.¹⁵ The Supreme Court's failure to address privacy for electronic communications mirrors the state courts' reluctance to apply privacy protections to the internet age.

As employees face termination for their off-duty internet conduct, they seek different means of legal protection. Public employees may be able to protect themselves with the First Amendment.¹⁶ When a public employer fires an employee in violation of the First Amendment, this triggers state action; therefore, the employee has First Amendment protection.¹⁷ However, First Amendment protection is fairly limited in the employment context. In order to warrant First Amendment protection, an employee must speak on a

for Employee Blogging: Number One Tech Trend for 2005 and Beyond, or a Recipe for Getting Dooce'd?, 2006 UCLA J.L. & TECH. 4, ¶ 6 (2006) [hereinafter Lichtenstein & Darrow, *Employment Termination*]; Amy Joyce, *Free Expression Can Be Costly When Bloggers Bad-Mouth Jobs*, WASH. POST., Feb. 11, 2005, at A1 ("Blogger Heather B. Armstrong coined the phrase in 2002, after she was fired from her Web design job for writing about work and colleagues on her blog, Dooce.com.").

¹² *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010).

¹³ *Id.*

¹⁴ *Id.* at 2630.

¹⁵ *Id.*; see Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 ("Judge Frank M. Hull of the federal appeals court in Atlanta complained that the privacy decision featured 'a marked lack of clarity,' and was almost aggressively unhelpful to judges and lawyers.").

¹⁶ See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 392 (1987); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563, 564–65 (1968).

¹⁷ See 42 U.S.C. § 1983 (2006); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982).

matter of “public concern.”¹⁸ The Supreme Court’s recent holding in *Garcetti v. Ceballos* further diminishes this right; the Court held that an employee is not entitled to First Amendment protection when speaking pursuant to their official work duties.¹⁹

While the protection of off-duty conduct for an employee is fairly limited in the public sector, the private sector offers even less protection. Absent a specific statutory exception, forty-nine states follow the default presumption of at-will employment.²⁰ Montana departed from the traditional common law method of the employment at-will doctrine by codifying a “good cause” standard for employee termination.²¹ The other forty-nine states have rejected the Model Employment Termination Act, which modeled a “good cause” standard after Montana;²² instead they continue to use at-will

¹⁸ See *Connick v. Myers*, 461 U.S. 138, 142 (1983) (“Our task . . . is to seek ‘a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968))).

¹⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (“We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.”). Public employees may also seek to argue that they are protected under the Fourth Amendment’s protection of privacy. See *Nat’l Treasury Emp. Union v. Von Raab*, 489 U.S. 656, 663 (1989). While this question has important implications in the evolving concept of internet communications, this question is outside the scope of this Note. The Supreme Court recently decided *City of Ontario v. Quon*, which confronted the issue of whether police officers have a reasonable expectation of privacy for their text messages. 130 S. Ct. 2619, 2629 (2010). Due to the difficult nature of the question, and the realization that it will have broad implications for “privacy expectations in communications made on electronic equipment,” the Court resolved the issue on narrower grounds. *Id.* at 2629–30.

²⁰ MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 878 (6th ed. 2007); see MONT. CODE ANN. § 39-2-903 (2009).

²¹ MONT. CODE ANN. § 39-2-903 (2009) (“‘Good cause’ means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer’s premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).”); see Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 375, 376 (1996); see also *Marcy v. Delta Airlines*, 166 F.3d 1279, 1285 (1999) (“The Montana Supreme Court has repeatedly found that an employee discharged for a reason based on mistaken interpretation of the facts has a valid claim under the WDEA, even if the employer acted in good faith.”).

²² MODEL EMP’T TERMINATION ACT OF 1991 § 1(4), 7A pt. 1 U.L.A. 308 (2002) (“‘Good cause’ means (i) a reasonable basis related to an individual employee for termination of the employee’s employment in view of relevant factors and circumstances, which may include the employee’s duties, responsibilities, conduct on the job or

employment as their default rule.²³ Private employees also lack First Amendment protection because private employers do not trigger state action.²⁴ Without these protections, private employees must seek legal recourse through either common law or state statutes.

While an employee may seek recourse through common law privacy, this protection is limited. Although state courts have generally recognized public policy exceptions to at-will employment, such as jury service, whistleblowing, and refusal to commit illegal acts,²⁵ courts are reluctant to grant public policy exceptions for general off-duty activities. The Restatement (Second) of Torts recognizes the tort of invasion of privacy, but this cause of action offers little help to an employee terminated due to off-duty internet activity.²⁶ To have a cause of action for invasion of privacy, the Restatement

otherwise, job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.”).

²³ Robinson, *supra* note 21, at 376; *see also* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976). The majority of states, however, recognize an increasing number of public policy exceptions for at-will employment. *See, e.g.*, Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 497 (Cal. 1994) (“[T]he policy subserved by the employee’s conduct must be a truly *public* one, that is ‘affect[ing] a duty which inures to the benefit of the *public at large* rather than to a particular employer or employee.’” (second alteration in original) (citing *Foley v. Interactive Data Corp.*, 765 P.2d 373, 379 (Cal. 1988))); *Gantt v. Sentry Ins.*, 824 P.2d 680, 692 (Cal. 1992).

²⁴ *See Shelley*, 334 U.S. at 11; *see also* ROTHSTEIN & LIEBMAN, *supra* note 20, at 871 (“Private sector employees may not challenge their discharge as violating federal constitutional guarantees such as due process, equal protection, and privacy.”); Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 342, 348–55 (1994) (recognizing the absence of First Amendment protection for private employees but suggesting that courts should implement a First Amendment public policy exception to protect private employees). One exception to this default rule is the Connecticut off-duty statute. *See also infra* note 39.

²⁵ Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 316 (2007); *see, e.g.*, *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (imposing a common law exception to the at-will employment doctrine for jury duty); Paul Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 161–64 (2003).

²⁶ RESTATEMENT (SECOND) OF TORTS § 652B (1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”); *see Smyth v. Pillsbury Co.*,

requires an intrusion into one's private affairs, which is highly offensive to a reasonable person.²⁷ Because blogs and social networking websites are public, an employee cannot successfully argue that there is a reasonable expectation of privacy for this content;²⁸ it is also unlikely that viewing one's internet activity would be interpreted as "highly offensive."²⁹ For example, in Massachusetts a court found that a television broadcast concerning a plaintiff's personal information was not an invasion of privacy because newspaper articles had already placed the information in the "public domain."³⁰

The National Labor Relations Board—recognizing the increasing importance of the issue—recently filed a complaint premised on the social networking policies of an employer.³¹ The Board's general counsel explained that the medium of social networking does not change the law that employees have a right to speak about their employer under the NLRA.³² This complaint places employers on notice of the importance of not tailoring their social networking policies too broadly so as to infringe on this legal protection.³³ This case will not carve out broad protections for the use of social networking websites, because even a ruling in favor of the employees

914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding there was not intrusion upon seclusion under common law privacy when an employer intercepted an employee's private email).

²⁷ RESTATEMENT (SECOND) OF TORTS § 652B.

²⁸ Cf. *United States v. King*, 509 F.3d 1338, 1341–42 (11th Cir. 2007) (holding that the defendant did not have a reasonable expectation of privacy to the files on his computer because his files were shared over a network).

²⁹ See Stephen D. Lichtenstein & Jonathan J. Darrow, *At-Will Employment: A Right to Blog or a Right to Terminate?*, 11 No. 9 J. INTERNET L. 1, 13 (2008) [hereinafter Lichtenstein & Darrow, *A Right to Blog*].

³⁰ *Brown v. Hearst Corp.*, 862 F. Supp. 622, 631 (D. Mass. 1994) (holding there was no invasion of privacy because facts exposed were already in television and newspapers); see also Aaron Kirkland, "You Got Fired? On Your Day Off?!": *Challenging Termination of Employees for Personal Blogging Practices*, 75 UMKC L. REV. 545, 557 (2006).

³¹ See Complaint and Notice of Hearing, Am. Med. Response of Conn., Inc. & Int'l Bhd. of Teamsters, No. 34-CA-12576 (N.L.R.B. Oct. 27, 2010); Steven Greenhouse, *Labor Board Says Rights Apply on Net*, N.Y. TIMES, Nov. 9, 2010, at B1 (noting that the policy at issue prevents union employees "from depicting the company 'in any way' on Facebook or other social media sites").

³² Greenhouse, *supra* note 31. The National Labor Relations Act protects the ability for employees to communicate—whether unionized or not—about their workplace. Therefore, an act that "tend[s] to chill employees in the exercise of [their] Section 7 rights" violates the NLRA. See *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

³³ See, e.g., Labor and Employment Lawflash, *NLRB to Prosecute Charge Regarding Employer's Social Media Policy*, MORGAN LEWIS (Nov. 8, 2010), available at http://www.morganlewis.com/pubs/LEPG_LF_EmployersSocialMediaPolicy_08nov10.pdf.

would hinge on an overbroad policy that limits online concerted activity.³⁴ However, this complaint demonstrates that the National Labor Relations Board realizes that employers and employees need clarification on what is acceptable activity for employees. In addition, a holding for the employee will be narrow. It would still only permit communications between employees that addresses employment concerns with their supervisors. This action shows the increasing importance of the issue, but the piecemeal agency and judicial approach will still only provide a gradual remedy. The growth of social networking is immeasurable, and the pace of litigation is unable to remedy issues which employees and employers face daily.

Therefore, in order to provide protection to private employees to the extent necessary within a modern, internet-based society, state legislatures should expand the present off-duty protection statutes. State legislatures first began eroding the at-will doctrine in the off-duty context by protecting off-duty use of tobacco and alcohol.³⁵ In a majority of states and the District of Columbia, employers cannot impose smoking bans on employees off the work premises.³⁶ In addition, twelve states protect the use of any lawful product off-duty, such as alcohol or even unhealthy foods.³⁷ Currently, only California, Colorado, New York, and North Dakota have off-duty protection statutes that protect employees for any lawful activity off-duty.³⁸ Connecticut

³⁴ Mathew W. Finkin, Op-Ed., *U.S. Employees Have Few Protections*, N.Y. TIMES (Nov. 15, 2010 11:56 AM), <http://www.nytimes.com/roomfordebate/2010/11/11/is-it-ok-to-bash-your-boss-on-facebook/us-employees-have-few-protections> ("The National Labor Relations Board complaint against American Medical Response of Connecticut breaks no new legal ground, but it points to a much larger development that U.S. law does not address—yet.").

³⁵ Ann L. Rives, *You're Not the Boss of Me: A Call For Federal Lifestyle Discrimination Legislation*, 74 GEO. WASH. L. REV. 553, 559 (2006).

³⁶ Jeremy Peters, *Company's Smoking Ban Means Off-Hours, Too*, N.Y. TIMES, Feb. 8, 2005, at C5; see also *Employee Off-Duty Conduct*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/IssuesResearch/EmploymentWorkingFamilies/EmployeeOffDutyConduct/tabid/13369/Default.aspx> (last updated May 30, 2008) [hereinafter *Employee Off-Duty Conduct*]. After Arizona repealed their off-duty tobacco use statute, twenty-nine states protect off-duty use of tobacco. *Id.*; ARIZ. REV. STAT. ANN. § 36-601.02 (2009).

³⁷ *Employee Off-Duty Conduct*, *supra* note 36; see, e.g., MINN. STAT. ANN. § 181.938 (2006) ("An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours. For purposes of this section, 'lawful consumable products' means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco.").

³⁸ CAL. LAB. CODE § 96(k) (West 2003); COLO. REV. STAT. § 24-34-402.5(1) (2010); N.Y. LAB. LAW § 201-d(2) (McKinney 2009); N.D. CENT. CODE § 14-02.4-03 (2009).

also limits off-duty employer intrusion, protecting employees' off-duty speech consistent with how the courts have interpreted the First Amendment.³⁹ Not only do these statutes vary in their protection, but the courts have interpreted these broad off-duty protection statutes differently. There has been little precedent on the scope of these statutes with respect to internet activity; the Supreme Court itself displayed that courts should be reluctant to establish privacy principles in this emerging field.⁴⁰ Therefore, it is currently difficult to predict the degree of protection these state statutes afford with respect to behavior on social networking websites and blogs. State legislatures should enact off-duty statutes or amendments to the current statutes that directly address internet activity. Otherwise, courts will confront an increasing number of termination suits, creating an inconsistent and convoluted mixture of judicial precedent, which may limit the benefits of internet technology.

As social networking sites and blogs continue to flourish, its advantages are realized,⁴¹ but employees must have notice of the extent to which their activities are protected.⁴² Blogging and social networking sites are not a mere hindrance to employers; rather, many employers have recognized their advantages, making them a valuable asset to their businesses.⁴³ In an effort to

³⁹ CONN. GEN. STAT. ANN. § 31-51q (West 2003).

⁴⁰ City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2629 (2010).

⁴¹ For example, although the Associated Press has specific guidelines for their employees with respect to social networking sites, the Associated Press encourages social networking. It not only helps disseminate their news stories, but is also an "important tool for AP reporters to gather news." *Social Networking Policy*, ASSOCIATED PRESS, available at http://www.wired.com/images_blogs/threatlevel/2009/06/Apsocialnetworkingpolicy.pdf (last visited Mar. 10, 2010) [hereinafter *Social Networking Policy*]; see also David Carr, *Why Twitter Will Endure*, N.Y. TIMES, Jan. 3, 2010, at WK1.

⁴² Compare *Social Networking Policy*, supra note 41, with Mike Florio, *ESPN's Guidelines for Social Networking*, PRO FOOTBALL TALK (Aug. 4, 2009), available at <http://profootballtalk.nbcsports.com/2009/08/04/espns-guidelines-for-social-networking/> ("Personal websites and blogs that contain sports content are not permitted . . . Prior to engaging in any form of social networking dealing with sports, you must receive permission from the supervisor as appointed by your department head."); see also Richard Sandomir, *ESPN Limits Social Networking*, N.Y. TIMES, Aug. 5, 2009, at B14.

⁴³ Quon, 130 S. Ct. at 2629 (2010) ("[M]any employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency."); *Social Networking Policy*, supra note 41 ("[Social networking is] a prime source for citizen journalism material. One of our top images from the US Airways crash in the Hudson River, for instance, was a photo taken by a civilian that first surfaced on Twitter."); see also Jenna Wortham, *The Value of a Facebook Friend? About 37 Cents*, N.Y. TIMES BITS (Jan. 9, 2009 8:47 PM), <http://bits.blogs.nytimes.com/2009/01/09/are-facebook-friends-worth-their-weight-in-beef/> ("Brian Gies, vice president of marketing for [Burger King], said the company had been eyeing Facebook as a marketing platform . . .") [hereinafter Wortham, *Facebook Friend*].

avoid litigation and enjoy the benefits of this expanding network of communication, employers must learn the scope of the off-duty statutes in order to implement their employment policies. Legislation can effectuate a balance between these competing interests and foster growth in an increasingly growing market for internet communication.

III. OFF-DUTY PROTECTION STATUTES

Despite the rise of internet activity, state statutes do not address employment termination premised upon blogging or the use of social networking websites.⁴⁴ Federal laws such as the Americans with Disabilities Act of 1990,⁴⁵ the Age Discrimination in Employment Act of 1967,⁴⁶ and Title VII of the Civil Rights Act of 1964⁴⁷ have already carved out other

⁴⁴ See John Hong, *Can Blogging And Employment Co-Exist?*, 41 U.S.F. L. REV. 445, 458 (2007); *Blogger's FAQ on Labor Law*, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/issues/bloggers/legal/labor> (last visited Apr.11, 2011) [hereinafter *Blogger's FAQ*].

⁴⁵ 42 U.S.C. §§ 12101–12213 (2006). The exception to the employment-at-will doctrine in the ADA states: “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* § 12112.

⁴⁶ 29 U.S.C. §§ 621–634 (2006). The exception to the employment-at-will doctrine in the ADEA states:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Id. § 623(a).

⁴⁷ 42 U.S.C. § 2000e (2006). The exception to the employment-at-will doctrine in Title VII states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

Id. § 2002e-2(a)(1).

exceptions to the at-will doctrine.⁴⁸ However, there is no general protection for off-duty conduct unless it falls within state statutes. Currently, the off-duty statutes in California, Colorado, North Dakota, New York, and Connecticut potentially offer minimal protection for off-duty internet communication, but the contours of these statutes are still undefined and require modification to better fit the growing internet lifestyle.⁴⁹ This Note will explore the breadth of these five off-duty protection statutes, and how the courts' interpretations of these statutes have narrowed their scope. The Note will explain that in order to foster the growth of internet communication, state legislatures must adopt a lifestyle statute that unambiguously addresses internet communication.⁵⁰

A. Colorado

Colorado enacted a statute making it unlawful for employers to prohibit legal off-duty activities as a condition of employment.⁵¹ The important exceptions to this rule are: an employer may ban legal activities if they relate to a "bona fide occupational requirement," or are "rationally related to the employment activities."⁵²

The Colorado courts best articulated the scope of this statute in *Marsh v. Delta Air Lines*.⁵³ In *Marsh*, Delta fired an employee after he wrote a letter to the *Denver Post* criticizing Delta's hiring policies.⁵⁴ By allowing regulation of this legal off-duty behavior, the court severely weakened the potency of this lifestyle discrimination statute. The plaintiff's letter to the editor is analogous to blogging, and *Marsh* helps illustrate how the courts would interpret off-duty protection in the Internet context. The Court held that the editorial neither displayed a conflict of interest, nor was related to this

⁴⁸ Hong, *supra* note 44, at 459; see also Amy M. Carlson, *States Are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd*, 42 DUQ. L. REV. 511, 512-14 (2004).

⁴⁹ See Lichtenstein & Darrow, *A Right to Blog*, *supra* note 29, at 13.

⁵⁰ See *infra* Part VI.B.

⁵¹ COLO. REV. STAT. ANN. § 24-34-402.5(1) (2010) ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . .").

⁵² *Id.*

⁵³ *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458 (D. Colo. 1997).

⁵⁴ *Id.* at 1463. ("This statutory shield, however, is not absolute. The fact that the Colorado legislature provided three exceptions to the general rule reflects the fact that the legislature recognized that the policy of protecting an employee's off-the-job privacy must be balanced against the business needs of an employer.").

employee's employment activities.⁵⁵ However, in interpreting the "bona fide occupational requirement," the court constructed an underlying duty of loyalty imposed upon the employee; the employee breached this duty by writing the editorial.⁵⁶ Creating a duty of loyalty helps counterbalance the employer's interests with the new autonomy provided to employees. However, the duty is a vague, judicially-created principle, leaving employees unsure of the boundaries of their off-duty rights in Colorado.

The imprecise duty of loyalty is a court-created doctrine, which has been potentially limited by subsequent holdings. In *Watson v. Public Service*, a court held that the lifestyle statute applied to all off-duty activities, even if the activities directly related to work.⁵⁷ In *Watson*, while off-duty, an employee made a complaint to the Occupational Safety and Health Administration (OSHA) concerning the working conditions.⁵⁸ The plaintiff was subsequently terminated, and the employer argued the off-duty statute was not applicable because the phone call to OSHA was work-related.⁵⁹ The court strictly followed the language of the statute, interpreting "any lawful activity" broadly.⁶⁰ The court limited *Marsh* by explaining that *Marsh's* dicta relied on a case which did not address the particular off-duty statute which defined the cause of action. Furthermore, the court explained that "no Colorado appellate opinion has approved the *Marsh* court's analysis."⁶¹ *Watson* examined *Marsh's* implied duty of loyalty, but suggested that this duty was limited to the facts of *Marsh* and only relates to "public

⁵⁵ *Id.* at 1463–64.

⁵⁶ *Id.* at 1463 ("By providing exceptions to the statute's general rule, the legislature indicated that it did not intend this privacy statute to provide a sword to employees thereby allowing employees to strike indiscriminate public blows against the business reputation of their employer. Accordingly, I find that one of the bona fide occupational requirements encompassed within the scope of Colo. Rev. Stat. § 24-34-402.5(1)(a) is an implied duty of loyalty, with regard to public communications, that employees owe to their employers."); Lichtenstein & Darrow, *A Right to Blog*, *supra* note 29, at 15; Elizabeth R. Rita & Eric D. Gunning, *Navigating the Blogosphere in the Workplace: The Blogosphere or: How I Learned to Stop Worrying and Love the Blog*, 35 COLO. LAW. 55, 57 (2006).

⁵⁷ *Watson v. Pub. Serv. Co. of Colo.*, 207 P.3d 860, 863 (Colo. App. 2008).

⁵⁸ *Id.*

⁵⁹ *Id.* at 863–64.

⁶⁰ *Id.* at 864 ("Any' means 'all.' We are 'not to presume that the legislative body used language 'idly and with no intent that meaning should be given to its language.'") (first citation omitted) (quoting *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservatory Dist.*, 109 P.3d 585, 597 (Colo. 2005))). *But see* *Yarbrough v. ADT Security Servs., Inc.*, No. 07-CV-01564-LTB-KMT, 2008 WL 3211284, at *6 (D. Colo. Aug. 6, 2008) (holding that an employee obtaining a temporary restraining order did not constitute off-duty legal activity within the meaning of the Colorado statute).

⁶¹ *Watson*, 207 P.3d at 865.

communications.”⁶² Whether the dicta from *Marsh* withstands *Watson* has important implications for internet activity. There have been very few cases addressing this statute, and without legislative action, the direction of this law rests with the judiciaries.

For an employee who seeks to act within the confines of Colorado’s off-duty protection statute, the judicial precedent provides little guidance. The result of this ambiguity is a chilling of individuals’ off-duty legal activities, such as blogging or social networking. As society relies more on the Internet, and electronic communication becomes the preferred media, legislatures should adapt current law to foster this growth. Similar to the reasoning in *Marsh*, a court would likely find that an employee’s blog or social networking site is neither a conflict of interest nor related to employment responsibilities.⁶³ The future of allowing this off-duty internet activity hinges on *Marsh*’s duty of loyalty. While *Watson* repudiates the duty of loyalty, it still suggests the existence of a narrow interpretation, explaining that perhaps this duty still exists for public communications. Any public blog would fall under this exception, and therefore an employee-blogger would potentially face termination under the Colorado statute.⁶⁴

If David Becker of Vinson & Elkins were acting under this statute, the issue would be whether his description of his future workplace displayed disloyalty. The arbitrariness and gradual development of common law is inadequate with the rapidly evolving technological society. Therefore, legislatures should more accurately define off-duty protection.

B. North Dakota

The North Dakota off-duty protection statute follows the same language as Colorado, and has similarly been shaped by judicial interpretation.⁶⁵ North Dakota offers broad protection for lawful off-duty activities, as long as they are not “contrary to a bona fide occupational qualification that . . . rationally

⁶² *Id.*

⁶³ *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1464 (D. Colo. 1997) (“In interpreting the plain meaning of the statute, the term conflict of interest should be given its generally understood meaning; that is, that it relates to fiduciaries and their relationship to matters of private interest or gain to them or a situation in which regard for one duty tends to lead to disregard of another. Plaintiff was not disregarding his duties in favor of personal gain by writing the Post. In fact, it cannot fairly be argued that Plaintiff sought any personal gain by writing the Post.” (citation omitted) (internal quotation marks omitted)).

⁶⁴ See Lichtenstein & Darrow, *A Right to Blog*, *supra* note 29, at 15.

⁶⁵ *Id.* at 14.

relates to employment activities.”⁶⁶ Similar to the duty of loyalty created in *Marsh*, a North Dakota court in *Fatland v. Quaker State* determined that decreasing business goodwill may fall within the bona fide exception.⁶⁷ This interpretation has the ability to severely limit the impact of this off-duty protection statute. Another potential problem is North Dakota’s inability to clearly define “lawful activity” off the work premises.⁶⁸ In *Hougum v. Valley Memorial Homes*, the court avoided deciding whether terminating employment for masturbating in a bathroom stall fell within the confines of the off-duty statute.⁶⁹ Although public masturbation is clearly unlawful and outside the scope of statutory protection, it was unclear whether masturbation is unlawful inside a private stall.⁷⁰ Refusing to determine whether this act was lawful displays that the court took a broad interpretation of the statute, seeking to follow the language rather than the purpose of the statute. The opposing view is explained in Chief Justice Vande Walle’s brief dissent, where he disagreed that the North Dakota statute intended to protect acts such as masturbation.⁷¹

⁶⁶ N.D. CENT. CODE § 14-02.4-08 (2009); *see* N.D. CENT. CODE § 14-02.4-01 (2009) (“It is the policy of this state to prohibit discrimination . . . with regard to marriage or public assistance, or participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.”).

⁶⁷ *See* *Fatland v. Quaker State Corp.*, 62 F.3d 1070, 1072–73 (8th Cir. 1995) (“Quaker State contends that the Policy sets forth a bona fide occupational qualification that reasonably and rationally relates only to employees, such as Fatland, whose involvement in an off-hours activity constitutes a conflict of interest with the employer because of the position of the employee within the company. Fatland’s duties included the marketing of Quaker State products Had Fatland been employed as, say, a janitor, Quaker State argues, his operation of a fast lube operation would not necessarily have had a deleterious effect on Quaker State’s relationship with its other customers.”); Lichtenstein & Darrow, *A Right to Blog*, *supra* note 29, at 14.

⁶⁸ *See* Shari Jo Levy & Sean M. Novak, *North Dakota Supreme Court Review*, 74 N.D. L. REV. 567, 575 (1998); *see also* Terry Morehead Dworkin, *It’s My Life—Leave Me Alone: Off-The-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 81 (1997).

⁶⁹ *Hougum v. Valley Mem’l Homes*, 574 N.W.2d 812, 822 (N.D. 1998) (“We decline to hold, as a matter of law, Hougum’s conduct in the Sears restroom constituted either lawful or unlawful activity. Hougum has raised a disputed factual issue about whether his conduct was not forbidden by law and therefore may fit within the protected status of lawful activity off the employer’s premises.”).

⁷⁰ *Id.* at 821–22.

⁷¹ *Id.* at 822–23 (Vande Walle, J., concurring in part and dissenting in part) (“I do not believe, as a matter of law, the Human Rights Act, Chapter 14-02.4, NDCC, is intended to protect as ‘lawful activity off the employer’s premises during nonworking hours’ sexual activity, alone or with others, in a bathroom in a store in a shopping mall.”); Rives, *supra* note 35, at 561.

Similar to Colorado, there are few cases addressing the boundaries of this off-duty statute. One can only speculate as to how the court will interpret the statute with respect to blogs and social networking. By refusing to affirmatively hold that masturbating in a private stall is outside the confines of the off-duty statute, the court illustrates a broad view of what is protected activity. With the court's reasoning from *Hougum*, it would appear likely that the much less overtly offensive acts—blogging or social networking—should be within the scope of North Dakota's protected activities. However, if the courts moved more toward the intent-based views of Justice Vande Walle, the statute will be severely limited; this statute most likely did not broadly address off-work activity but rather, off-duty tobacco use.⁷² However, even with the broad dicta from *Hougum*, the courts have suggested a duty of loyalty from *Fatland*, which could be breached by blogs or social networking. A court may easily find that public communications are much more likely to decrease goodwill than a private incident similar to *Hougum*. It would be an anomalous result to protect masturbation but not internet activity. Similar to Colorado, the common law development is gradual and leaves employees inadequately notified of their limits.

C. New York

New York's off-duty protection statute differs slightly from Colorado and North Dakota in that it protects any lawful activity "engaged in for recreational purposes."⁷³ Although this difference appears subtle, it influenced the court in *State v. Wal-Mart*, which held that dating is not a "recreational activity," and thus not protected under this statute.⁷⁴ Despite specific statutory text that illustrates that these activities include "but [are] not limited to sports, games, hobbies, exercise, reading and viewing of television,"⁷⁵ the court used *noscitur a sociis* to conclude that dating did not

⁷² See 2 JAMES O. CASTAGNERA ET AL., TERMINATION OF EMPLOYMENT § 37:19 (2010).

⁷³ N.Y. LAB. LAW § 201-d(b) (McKinney 2009). ("Recreational activities' shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.").

⁷⁴ *State v. Wal-Mart Stores Inc.*, 207 A.D.2d 150, 152 (N.Y. App. Div. 1995) ("To us, 'dating' is entirely distinct from and, in fact, bears little resemblance to 'recreational activity.' Whether characterized as a relationship or an activity, an indispensable element of 'dating,' in fact its *raison d'être*, is romance, either pursued or realized.").

⁷⁵ N.Y. LAB. LAW § 201-d(b).

fall within the scope of the statute.⁷⁶ Similar to the disagreement about the intent of the off-duty statute by the North Dakota Supreme Court in *Hougum*, the dissent explains that this narrow interpretation of “recreation” limits the underlying purpose of the statute.⁷⁷ The purpose of the statute is to give employees a degree of autonomy outside of work, and a distinction based on dating has no merit, and is an “enforcement nightmare.”⁷⁸

Despite the Southern District of New York declining to follow *Wal-Mart* in *Pasch v. Katz Media*, which was subsequently overruled, dating is still not protected by § 201-d.⁷⁹ The United States Court of Appeals for the Second Circuit solidified the holding from *Wal-Mart* in *McCavitt v. Swiss Reinsurance*, concluding that without evidence that the New York Court of Appeals would hold differently, it is bound by *Wal-Mart*.⁸⁰ However, Judge McLaughlin’s concurrence displays vehement opposition to New York’s narrow interpretation of this statute.⁸¹ Judge McLaughlin explains that the

⁷⁶ See Lichtenstein & Darrow, *A Right to Blog*, *supra* note 29, at 16 (“[N]oscitur a sociis holds that the ‘meaning of an unclear word or phrase should be determined by the words immediately surrounding it.’” (quoting *McCavitt v. Swiss Reinsurance Am. Corp.*, 237 F.3d 166, 168 n.2 (2d Cir. 2001)); see also 2 L. CAMILLE HÉBERT, EMPLOYEE PRIVACY LAW § 13:32 (2006) (“The practical effect of the court’s analysis is mindboggling. The court suggests that the distinction between protected activities and unprotected activities, whether they are engaged in by married or unmarried employees, depends on the existence of a ‘mutual romantic interest.’”).

⁷⁷ *Wal-Mart Stores*, 207 A.D.2d at 153 (Yesawich, J., dissenting) (“In my view, given the fact that the Legislature’s primary intent in enacting Labor Law § 201-d was to curtail employers’ ability to discriminate on the basis of activities that are pursued outside of work hours, and that have no bearing on one’s ability to perform one’s job, and concomitantly to guarantee employees a certain degree of freedom to conduct their lives as they please during nonworking hours, the narrow interpretation adopted by the majority is indefensible.”).

⁷⁸ HÉBERT, *supra* note 76, § 13.32.

⁷⁹ *Pasch v. Katz Media Corp.*, No. 94 Civ. 8554(RPP), 1995 WL 469710, at *5 (S.D.N.Y. Aug. 8, 1995).

⁸⁰ *McCavitt v. Swiss Reins. Am. Corp.*, 237 F.3d 166, 168 (2d Cir. 2001) (“We, like the district court, find no persuasive evidence—nothing in logic, the language of § 201-d, its legislative history, or New York state case law—that leads us to conclude that the New York Court of Appeals would hold that romantic dating is a “recreational activity” under New York Labor Law § 201-d(1)(b) contrary to the holding of *Wal-Mart*.”).

⁸¹ *McCavitt*, 237 F.3d at 169–70 (McLaughlin, J., concurring) (“Although I concur in my colleagues’ decision, I do so grudgingly. . . . It is repugnant to our most basic ideals in a free society that an employer can destroy an individual’s livelihood on the basis of whom he is courting, without first having to establish that the employee’s relationship is adversely affecting the employer’s business interests. Lest our faith in this free society be dampened, it is my sincerest hope that, if given the chance, the New York Court of Appeals will find that the necessary protection lies within N.Y. Labor Law § 201-d. If not, may the State Legislature amend the statute accordingly.”).

reasoning is “repugnant,” and he called upon the legislature or the New York Court of Appeals to change its reasoning.⁸² Despite *Pasch* and the concurrence from *McCavitt*, the interpretation of § 201-d remains, leaving ambiguity to the breadth of this statute, and what other limits will be imposed upon the term “recreational.” This is apparent in the recent case of *Kolb v. Camilleri*, in which the court followed *McCavitt* to conclude that picketing is not a recreational activity, and thus not protected under § 201-d.⁸³

The unambiguous text of § 201-d and its counterintuitive judicial interpretation leaves employees unsure as to their potential protection for off-duty internet activity. The statute’s text clearly states that the list is illustrative rather than exhaustive,⁸⁴ but by excluding dating and picketing, the court suggests that the list is exhaustive. *Kolb* demonstrates that the exclusion of romantic relationships is not merely an anomaly, but that the courts are willing to expand off-duty activities outside the scope of § 201-d. While blogging and social networking do not directly fall within the text of the statute, one must conjecture whether they are included. It is possible that these internet activities would be considered hobbies,⁸⁵ but one could make a strong counter-argument applying *noscitur a sociis*. Under § 201-d, writing of one’s own opinion is excluded, because the statute only addresses viewing television, movies and books, rather than creating.⁸⁶ The critical concurrence of Judge McLaughlin displays that the judiciary is not in agreement on the statutory interpretation of § 201-d, and without legislative action, it will be subject to varying and potentially inconsistent opinions.

D. California

The California legislature adopted an off-duty statute in 2000, which on its face appeared much broader than any other state off-duty protection

⁸² *Id.*

⁸³ *Kolb v. Camilleri*, No. 02-CV-0117A(Sr), 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008) (“Applying this analysis to the instant case, the Court concludes that plaintiff’s picketing falls outside of the definition of recreational activities. Plaintiff did not engage in picketing for his leisure, but as a form of protest. While the Court has found such protest worthy of constitutional protection, it should not engender simultaneous protection as a recreational activity akin to ‘sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.’”).

⁸⁴ N.Y. LAB. LAW § 201-d (McKinney 2009) (“including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material”).

⁸⁵ Lichtenstein & Darrow, *A Right to Blog*, *supra* note 29, at 16.

⁸⁶ N.Y. LAB. LAW § 201-d.

statute.⁸⁷ Based upon the text of the statute, there is not an exception for a bona fide occupational requirement or for off-duty acts that have harmful effects on business; therefore, it appears broader than the North Dakota, New York, and Colorado statutes.⁸⁸ The courts initially adopted this broad approach,⁸⁹ but quickly limited the statute by following a more restrictive view set forth by the California Attorney General.⁹⁰ The Attorney General's views were applied in *Barbee v. Household Automotive*, which held that § 96(k) did not create a substantive right, but is rather a procedure for the Labor Commissioner to uphold already "recognized constitutional rights."⁹¹

California's appellate court expanded the reasoning from *Barbee* in *Grinzi v. San Diego Hospice*, by holding that § 98.6 is merely a procedural enactment, and employees have no substantive protection under this statute.⁹² Section 98.6 forbids discrimination against employees for any conduct mentioned in § 96(k).⁹³ While this appeared to provide employee protection for off-duty conduct, the court followed *Barbee* by holding that § 96(k) created no new substantive rights, and only protects previously recognized rights.⁹⁴ Therefore, while the text of § 96(k) suggests protections similar to or

⁸⁷ CAL. LAB. CODE § 96(k) (West 2003) (The statute authorizes the labor commissioner to pursue "[c]laims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.").

⁸⁸ *Id.*; Erich Shiner, *Keeping the Boss out of the Bedroom: California's Constitutional Right of Privacy as a Limitation on Private Employer's Regulation of Employee's Off-Duty Intimate Association*, 37 MCGEORGE L. REV. 449, 469 (2006); see also Jill Yung, *Big Brother IS Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It*, 36 SETON HALL L. REV. 163, 194 n.143 (2005).

⁸⁹ See *Tavani v. Levi Strauss & Co.*, No. A095770, 2002 WL 31623684, at *15 (Cal. Ct. App. Nov. 21, 2002); Shiner, *supra* note 88, at 470.

⁹⁰ Opinion No. 00-303, 83 Ops. Cal. Att'y Gen. 226 (Oct. 10, 2000), available at 2000 WL 1514816. The California Attorney General explained that § 96(k) did not create a new legal right for employees, but was a mere "procedural mechanism." *Id.* at 230.

⁹¹ *Barbee v. Household Auto. Fin. Corp.*, 6 Cal. Rptr. 3d 406, 412 (Cal. Ct. App. 2003).

⁹² *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 904 (Cal. Ct. App. 2004) ("[T]o conclude the Legislature intended 'any rights' in this context (§ 98.6, subd. (a)) to reach constitutional rights guaranteed only against governmental infringement would result in 'mischief or absurdity' rather than 'wise policy' when the statutory language is applied. Such an interpretation would severely limit an employer's 'general discretion to discharge an at-will employee without cause under section 2922' and unduly interfere with 'the Legislature's goal to give law-abiding employers broad discretion in making managerial decisions.'" (citations omitted)).

⁹³ CAL. LAB. CODE § 98.6 (West 2006).

⁹⁴ *Grinzi*, 14 Cal. Rptr. 3d at 904.

beyond that of other off-duty statutes, California offers private employees no protection for their off-duty behavior.⁹⁵

Although California is often categorized with New York, Colorado, and North Dakota as having an off-duty protection statute, California's judiciary has removed any substantive protection from this statute. It is unclear whether this was the intended result of the legislature, but the legislature should be more direct in its language so as to illustrate what it protects, rather than have the judiciary resurrect at-will employment principles despite statutory text to the contrary. To seek protection, a private employee in California must make a claim for a constitutional invasion of privacy.⁹⁶ In the Ninth Circuit case, *Quon v. Arch Wireless*, the court held that plaintiffs invaded employees' privacy by auditing text messages on an employer-provided pager.⁹⁷ Although this case does not directly address the issue of this Note, it provided the Supreme Court with the opportunity to demonstrate the importance of adapting laws to fit with modern notions of technology.⁹⁸ Although one will not be able to argue they had an expectation of privacy with a public blog, one may have a privacy right to non-posted blog-related information on a company computer.⁹⁹ Although the Supreme Court explained the increasing importance of electronic privacy in dicta,¹⁰⁰ it

⁹⁵ Shiners, *supra* note 88, at 473. The only protection would have to be under the common law Restatement (Second) of Torts, which is very limited. See *supra* note 26 and accompanying text.

⁹⁶ ORRICK, HERRINGTON & SUTCLIFFE LLP, EMPLOYMENT LAW YEARBOOK 1082 (2009) ("[S]tate protection is 'no broader . . . than the 'privacy' protected by the Fourth Amendment.'" (alteration in original) (citing *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 30 n.9 (Cal. 1994))).

⁹⁷ *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 904 (9th Cir. 2008) ("The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored. Here, we must first answer the threshold question: Do users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network?").

⁹⁸ *City of Ontario, Cal. v. Quon*, 130 S.Ct. 2619, 2619 (2010); see also Robert Barnes, *Court to Rule on Privacy of Texting*, WASH. POST, Dec. 15, 2009, at A2 ("Though the case before the court involves government employees . . . case law in the private workplace often evolves from such decisions."); Adam Liptak, *Text-Message Privacy Case is Accepted by Justices*, N.Y. TIMES, Dec. 5, 2009, at A23 ("[T]he Supreme Court's decision may provide hints about its attitude toward privacy in the Internet era more generally.").

⁹⁹ See EMPLOYMENT LAW YEARBOOK, *supra* note 96, § 15:3.4(B)(3).

¹⁰⁰ *Quon*, 130 S.Ct. at 2630 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be an essential means or necessary instruments for self-expression, even self-identification.").

avoided a broad ruling of privacy protection and ruled on narrower grounds.¹⁰¹

E. *Connecticut*

Connecticut departs from the traditional language of the previous off-duty statutes by protecting private employees with the “rights guaranteed by the [F]irst [A]mendment,” as long as the speech does not interfere with job performance or working relationships.¹⁰² While this statute moves beyond other states by more broadly and affirmatively protecting speech, the statute is also more restrictive. Unlike other off-duty statutes, Connecticut only protects speech and provides no protection for any other off-duty conduct.¹⁰³ This statute is also limiting because First Amendment protection is fairly limited in the employment context, only protecting speech which communicates a matter of “public concern.”¹⁰⁴ Determining what exactly is a matter of public concern is a difficult task, requiring a large body of precedent and case-by-case analyses. Pointing out potential illegal activity or recommending alternative education methods for children were both considered matters of public concern in Connecticut,¹⁰⁵ but the courts must also balance the speech with the statute’s exceptions.

While seemingly granting employees expansive protection, the protection this statute affords is limited. In the context of social networking, it is likely that a court would find most speech not a matter of public concern. Similarly, one is only provided with protection for their speech on blogs if this is a matter of public concern. Forcing one to guess as to the importance of their blog will have a chilling effect on potential employee-bloggers. Therefore, to warrant protection, one must blog on a matter of public concern, but this is further limited by the statute’s exceptions. If one intended to blog about the inside politics of their corporation—which may be a matter of public concern for a large company—this would not be protected because

¹⁰¹ *Id.*

¹⁰² CONN. GEN. STAT. ANN. § 31-51q (West 2003).

¹⁰³ *See id.*

¹⁰⁴ *Daley v. Aetna Life and Cas. Co.*, 734 A.2d 112, 121 (Conn. 1999); *see also Connick v. Meyers*, 461 U.S. 138, 146–47 (1983). After the Supreme Court’s most recent holding in *Garcetti*, the scope of Connecticut’s statute is even narrower; the Court stated that the First Amendment does not provide protection to an individual addressing work-related matters. *See Garcetti*, 547 U.S. at 426.

¹⁰⁵ *See, e.g., Campbell v. Windham Cmty. Mem’l Hosp.*, 389 F. Supp. 2d 370, 382 (D. Conn. 2005); *Sturm v. Rocky Hill*, No. 3:03CV666AWT, 2005 WL 733778, at *2 (D. Conn. Mar. 29, 2005).

it interferes with the employee's "working relationship."¹⁰⁶ Therefore, under Connecticut's statute, an employee will likely have no protection for social networking and very limited protection for blogging.

IV. COMPARISON OF OFF-DUTY STATUTES

Despite the growth of these state statutes, they provide little protection for employees and limited guidance to employers. While these lifestyle statutes appear to make substantial strides toward protecting employees, the courts have interpreted the ambiguous language narrowly.¹⁰⁷ While it is important to balance the interests of the employer with employee protection statutes, the courts have tipped the scales by removing much substance from these statutes. Although the statutes' language is very similar, the minor differences and judicial tweaks have significant legal implications. State legislatures must address these nuances to both balance the competing interests of employers and employees, and to give these statutes substance. Despite the narrow judicial opinions on these statutes, the cases demonstrate significant opposition from the bench. A Colorado court made great efforts to distinguish and diminish the precedent of *Marsh*.¹⁰⁸ Similarly, in both North Dakota's and New York's precedential holdings of *Hougum* and *McCavitt*, judges displayed strong opposition to the interpretation and current jurisprudence.¹⁰⁹ The interpretation of California's statute was similarly ambiguous until the Attorney General established the narrow view, which the courts adopted.¹¹⁰ This consistent dispute over these statutes illustrates that they are ripe for change, and the legislatures should tailor them more toward the modern internet-based society.¹¹¹

One important difference between these statutes is whether they affect solely employment termination or any employment action. Colorado protects employees from termination on account of off-duty behavior, but this statute does not address other adverse employment treatment.¹¹² New York and

¹⁰⁶ CONN. GEN. STAT. ANN. § 31-51q; Lichtenstein & Darrow, *Employment Termination*, *supra* note 11, ¶ 59.

¹⁰⁷ Lichtenstein & Darrow, *Employment Termination*, *supra* note 11, ¶ 66.

¹⁰⁸ *See supra* Part III.A.

¹⁰⁹ *See supra* Part III.B & C.

¹¹⁰ *See supra* Part III.D.

¹¹¹ In a sample letter to the editor about lifestyle discrimination drafted by the National Workrights Institute, the organization explains that due to technology, "information becomes easier and easier to obtain," and privacy protection becomes even more important. *Sample Letter to the Editor: Lifestyle Discrimination*, NAT'L WORKRIGHTS INST., http://www.workrights.org/issue_lifestyle/ld_letter_to_editor.html (last visited Dec. 30, 2010) (on file with author) [hereinafter NAT'L WORKRIGHTS INST.].

¹¹² COLO. REV. STAT. § 24-34-402.5 (2010); Gely & Bierman, *supra* note 25, at 320.

North Dakota, however, have much broader off-duty protection, barring employers from discriminating “against an individual in compensation, promotion or terms, conditions or privileges of employment.”¹¹³ The specific remedies available to the employees also differ by state, and the legislatures should use this nuance to balance employer interests with employee privacy. North Dakota encourages mediation and has a variety of remedies available, while in Colorado, a “civil action for damages” is the employee’s only recourse.¹¹⁴ New York gives the Labor Commissioner authority to implement fines against employers who violate § 201-d.¹¹⁵ Whether a statute provides compensatory or equitable relief is an important consideration for a plaintiff in weighing the costs of bringing a claim, and this legislative decision has far reaching implications for the effectiveness of a statute. The differing language and implementation of each of these statutes has shaped their effectiveness. As the case law demonstrates however, no method has been flawless or without dispute.

Despite judicial opinions leaning against off-duty protection statutes, legislatures have gradually been moving toward more protection. With a majority of states protecting off-duty use of legal substances,¹¹⁶ and with federal legislation slowly weakening at-will employment,¹¹⁷ the legislatures have displayed a willingness to depart from this anachronistic doctrine.¹¹⁸

¹¹³ N.Y. LAB. LAW § 201-d (McKinney 2009); *see also* N.D. CENT. CODE § 14-02.4-03 (2009) (“It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment.”). The California statute uses similar language, but because § 96(k) provides mere procedural protection, it is less significant. CAL. LAB. CODE § 96(k) (West 2003).

¹¹⁴ *See also* Gely & Bierman, *supra* note 25, at 321. *Compare* N.D. CENT. CODE § 14-02.4, with COLO. REV. STAT. § 24-34-402.5(2)(a).

¹¹⁵ N.Y. LAB. LAW § 213.

¹¹⁶ *Employee Off-Duty Conduct*, *supra* note 36.

¹¹⁷ *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2006); Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000(e)–2000(e)-17 (2006); Americans with Disabilities Act of 1990, 43 U.S.C. §§ 12101–12117 (2006)

¹¹⁸ It is beyond the scope of this Note, but there is also an important comparison of the underlying United States’ labor principles to those of other nations. Matthew Finkin compares the United States to France and Germany, where “off duty time must remain at the workers’ disposition alone.” Matthew W. Finkin, *Life Away From Work*, 66 LA. L. REV. 945, 948 (2006) (citing 2 WOLFGANG DÄUBLER, DAS ARBEITSRECHT § 5.7, at 339–40 (1998)) [hereinafter Finkin, *Life Away From Work*]; *see also* Adam Liptak, *When Free Worlds Collide*, N.Y. TIMES, Feb. 28, 2010, at WK1 (“For many purposes, the European Union is today the effective sovereign of global privacy law,” Jack Goldsmith and Tim Wu wrote in their book ‘Who Controls the Internet?’ in 2006. This may sound odd in

Despite only having broad off-duty protection statutes in just a few states, this in fact accounts for approximately 20% of the national population.¹¹⁹ In addition, other states have proposed similar legislation, and specific cities have passed broad off-duty protection statutes to make up for the lack of state legislation.¹²⁰ Modeled after its predecessors, the Pennsylvania House introduced an off-duty protection statute in 2005, and the Michigan Senate introduced a bill in 2007.¹²¹ Both statutes implement aspects of the pioneering state statutes, using them as a template to provide employees with more protections than they currently enjoy. The Michigan bill applies to all employment actions—not merely termination—and unlike Colorado, it provides employees with injunctive relief and damages.¹²² In states that have not yet adopted an off-duty protection statute, select city legislatures have adopted protection statutes.¹²³ Despite the movement toward off-duty protection in the realm of tobacco, alcohol, and generally all off-duty legal activities, no legislature has yet addressed the issue of internet activity. As courts face the prospect of interpreting these statutes with respect to internet activity, the legislatures should assist by directly addressing off-duty internet activity.

V. COMPETING POLICY IMPLICATIONS OF OFF-DUTY STATUTES

While the argument for extending off-duty protection to employees is meritorious, it is still subject to much rebuke.¹²⁴ Employment legislation

America, where the First Amendment has pride of place in the Bill of Rights. In Europe, privacy comes first. Article 8 of the European Convention on Human Rights says, 'Everyone has the right to respect for his private and family life, his home and his correspondence.' The First Amendment's distant cousin comes later, in Article 10.').

¹¹⁹ James A. Sonne, *Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior*, 43 GA. L. REV. 133, 177 (2008) (citing U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ANNUAL ESTIMATES OF THE POPULATION FOR THE U.S. REGIONS, STATES, AND PUERTO RICO, tbl.1 (2007), available at <http://www.census.gov/popest/states/tables/NST-EST2007-01.xls>).

¹²⁰ *Blogger's FAQ*, *supra* note 44.

¹²¹ H.B. 1271, 2005 Gen. Assemb., Reg. Sess. (Pa. 2005), available at <http://www.legis.state.pa.us> (follow the "Session Information" hyperlink, search "by bill" for "2005–2006 Regular Session," "HB 1271"); S.B. 457, 94th Leg., Reg. Sess. (Mich. 2007), available at <http://www.legislature.mi.gov/documents/2007-2008/billintroduced/Senate/pdf/2007-SIB-0457.pdf>.

¹²² Mich. S.B. 457.

¹²³ *Blogger's FAQ*, *supra* note 44 (noting that Seattle, Lansing, and Madison have all adopted statutes that guarantee some form of protection for off-duty behavior).

¹²⁴ Robert M. Howie & Laurence A. Shapero, *Lifestyle Discrimination Statutes: A Dangerous Erosion of At-Will Employment, a Passing Fad, or Both?*, 31 EMP. REL. L.J. 21, 35 (2005); Sonne, *supra* note 119, at 184. Howie and Shapero argue that lifestyle

always faces the competing interests of employers and employees, and the best policies balance these oppositional interests.¹²⁵ In drafting off-duty protection statutes, there are many employer interests that legislatures should address. An overly strong employee protection statute will make businesses reluctant to operate in a particular state, causing the anomalous result of harming employees.¹²⁶ This Note addresses these competing policy interests to better formulate a model statute.

A. *Opposition to Off-Duty Protection*

Despite this Note's focus on the reasons for adopting off-duty protection statutes, there are strong policy arguments against undermining the traditional at-will doctrine.¹²⁷ State legislatures must consider these arguments against eroding at-will employment when contemplating legislative action. At-will employment has been, and continues to be, the default employment relationship in the United States; this employer and employee mutuality has shaped the American economy and mindset.¹²⁸ Underlying at-will employment is the philosophy that "men must be left . . . to discharge or retain employes [sic] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act."¹²⁹ An important argument for the opposition to off-duty protection is the clear lack of litigation these recent off-duty statutes have generated. The broad statutes in North Dakota, Colorado, and New York have not swarmed the courts' dockets, displaying that the need and enthusiasm for these statutes is

discrimination statutes provide "employees with a sort of 'catch all' remedy for adverse employment decisions with which they disagree." Howie & Shapero, *supra*, at 33.

¹²⁵ See ROTHSTEIN & LIEBMAN, *supra* note 20, at 16-17. Although outside the scope of this Note, the Supreme Court implements a similar balancing when examining the employment relationship with respect to the Fourth Amendment. See O'Connor v. Ortega, 480 U.S. 709, 719-20 (1987) ("[W]e must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace.").

¹²⁶ Hong, *supra* note 44, at 476.

¹²⁷ See, e.g., Richard A. Epstein, *In Defense of the Contract At-Will*, 51 U. CHI. L. REV. 947, 982 (1984) ("The strength of the contract at will should not be judged by the occasional cases in which it is said to produce unfortunate results, but rather by the vast run of cases where it provides a sensible private response to the many and varied problems in labor contracting.").

¹²⁸ ROTHSTEIN & LIEBMAN, *supra* note 20, at 866 ("Theoretically, the at-will rule operates on a principle of mutuality: both the employer and the employee are free to terminate their relationship at any time, without reason and without notice.").

¹²⁹ Payne v. W. & A. R.R. Co., 81 Tenn. 507, 518 (1884), *overruled on other grounds* by Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915).

overstated.¹³⁰ James Sonne argues that this disconnect is premised on the misconception that employers are on “fishing expeditions for dirty laundry.”¹³¹ An employer’s goal is centered on the best results for its business, and the off-duty protection statutes are an unnecessary protection, which employees have under-utilized. Sonne argues, the market is a better and more moderate protector of employee privacy, because an invasive employer will only harm their own business reputation.¹³² Off-duty protection statutes increase the cost of doing business, forcing employers to prepare for the prospect of litigation. An employer is unlikely to terminate arbitrarily because of the “implicit price” of this decision.¹³³ These statutes also force employers to retain employees who are not the best individuals for the job, slowing down the economy as a whole, and restraining business development. While there are policy interests which often outweigh burdens to business, a general notion of privacy for an at-will employee is unprecedented and unwarranted.

While the increase in technology makes employees’ off-duty behavior much more transparent, it increases the necessity of at-will employment for the employer. Technology blurs the lines between activities on and off the work premises, limiting employers from regulating potentially harmful behavior.¹³⁴ With the expanding use of blogs and social networking, it is outdated to forbid employers from considering these in making employment decisions. This mass communication further exposes employers to liability and increases the risk of exposure of business secrets. The lack of off-duty protection statutes does not leave employees vulnerable; they are still

¹³⁰ Sonne, *supra* note 119, at 184. *But see* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1675 (1996). Professor Estlund hypothesizes there are less claims of wrongful discharge because employees are “choosing not to engage in socially valued conduct that might get them fired.” *Id.* This theory proposed by Professor Estlund is especially relevant in the current context of blogs and social networking, which provide many important societal functions with access to information.

¹³¹ Sonne, *supra* note 119, at 183.

¹³² *Id.* at 184; *see also* Jessica Jackson, Comment, *Colorado’s Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143, 163 (1996).

¹³³ Epstein, *supra* note 127, at 973. Epstein explains that the “legal fragility” of at-will employment creates stability in the employment relationship. *Id.* at 974. The costs to employers are not merely the prospect of litigation but recruitment, training, and the loss of social capital from developing an employment relationship. *Id.* at 974–75.

¹³⁴ Howie & Shapero, *supra* note 124, at 35; *see* Brief of *Amici Curiae* Los Angeles Times Communications LLC et al. in Support of Petitioners at 19–31, *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010) (No. 08-1332).

protected by traditional common law privacy and public policy exceptions to at-will employment.¹³⁵

One may describe increasingly broad off-duty protection statutes as merely more laws furthering the gradual decline of at-will employment. However, one may argue that these statutes are a significant departure from previous employment protection statutes, weighing the scales much more heavily toward the employee than the employer, without a potent policy interest.¹³⁶ Protecting civil rights and preventing discrimination based on age and disability serve a worthwhile public policy that cannot compare to one's interest in blogging.¹³⁷ In seeking to strike a balance with employer and employee autonomy, society should be unwilling to compromise race preferences, but miscellaneous off-duty conduct does not amount to an equal moral imperative.¹³⁸

B. *Benefits of Off-Duty Protection*

Although employee off-duty protection statutes restrain employer autonomy and depart from a long history of treating the employer as the master of employment decisions,¹³⁹ there are justifications for extending protections for employees. At-will employment is no longer the talisman of employment law, but has rather been gradually eroding to coincide with society's modern policy interests.¹⁴⁰ The broad off-duty activity protection statutes are not an unprecedented departure from at-will employment. Rather, these statutes indicate the gradual recognition that legislatures are best fit to impose employee protections that our society deems important. Federal statutes, such as Title VII of the Civil Rights Act of 1964¹⁴¹ and the Age

¹³⁵ Sonne, *supra* note 119, at 139 (“[T]he solution should not be a blunt sword of law that profoundly undermines the entire at-will employment system but rather a refining scalpel of the marketplace that, on the whole, prizes hard work and punishes irrationality.”); *see also* Bodewig v. K-Mart, Inc., 635 P.2d 657, 662 (Or. Ct. App. 1981) (reversing summary judgment for defendant, holding that plaintiff-employee may have a claim for tort of outrageous conduct).

¹³⁶ Jackson, *supra* note 132, at 163.

¹³⁷ *See* Sonne, *supra* note 119, at 187.

¹³⁸ *Id.* In examining the overly broad nature of off-duty statutes, Sonne's article explains that they remove employer autonomy so that the NAACP would have to hire a Klu Klux Klan member. *Id.* (citing Donald Garner, *Protecting Job Opportunities of Smokers: Fair Treatment for the New Minority*, 23 SETON HALL L. REV. 417, 440 (1993)).

¹³⁹ ROTHSTEIN & LIEBMAN, *supra* note 20, at 19–29.

¹⁴⁰ Rives, *supra* note 35, at 567; *see also* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 7–12 (1988).

¹⁴¹ 42 U.S.C. §§ 2000(e)–2000(e)-17 (2006).

Discrimination in Employment Act of 1967,¹⁴² have legislatively broken the former rigidity of at-will employment. Similarly, states have eroded at-will employment in many ways. Montana has ended the traditional notion of at-will employment by requiring employers to show “good cause” for termination,¹⁴³ and currently a vast majority of states have specific statutes which limit at-will employment for certain off-duty activities.¹⁴⁴ Courts have created a complex body of common law to circumvent the injustice of at-will employment, carving out public policy exceptions where legislatures have not yet acted.¹⁴⁵ Developing legislation for off-duty protection will increase consistency and predictability in the judiciaries and prevent employment law changing from a “troublesome thicket to an impenetrable jungle.”¹⁴⁶ Legislation is the most effective means to protect employees and instill the values which society deems important.¹⁴⁷

Tech-savvy consumers are no longer the only group who utilize blogs and social networking. These developing technologies are not a passing fad, but have become a part of our culture whose importance grows exponentially each year.¹⁴⁸ The structure of these forms of internet communication, like Facebook and Twitter, has become indispensable and part of the fabric of our society.¹⁴⁹ Internet communication has been a valued asset not just for employees, but also employers who have realized the benefits of mass

¹⁴² 29 U.S.C. §§ 621–634 (2006).

¹⁴³ MONT. CODE ANN. § 39-2-904 (2009).

¹⁴⁴ Summers, *supra* note 140, at 13–14. Aside from mere off-duty protection statutes, states limit employers’ ability to require polygraph tests and drug tests, and statutes require employers to notify employees of plant closings. *Id.* at 16.

¹⁴⁵ *Id.* at 12 (explaining that courts have made public policy exceptions by creating causes of action in tort and contract law based on an implied duty of good faith); see *Cleary v. Am. Airlines, Inc.*, 168 Cal. Rptr. 722, 729 (Cal. Ct. App. 1980); *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 317 (Mass. 1976). While states formerly required the public policy exception to be grounded in a statutory provision, courts have been more liberal in granting public policy exceptions for professional conduct rules, administrative regulation, and even heroic conduct. ROTHSTEIN & LEIBMAN, *supra* note 20, at 949–53.

¹⁴⁶ Summers, *supra* note 140, at 18.

¹⁴⁷ *Murphy v. Am. Home Prod. Corp.*, 448 N.E.2d 86, 89–90 (N.Y. 1983) (explaining that the court refrains from an at-will public policy exception because policy is “best and more appropriately explored and resolved by the legislative branch of our government. The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, [and] to elicit the views of the various segments of the community . . .”).

¹⁴⁸ Lichtenstein & Darrow, *Employment Termination*, *supra* note 11, ¶ 1.

¹⁴⁹ Carr, *supra* note 41 (“Twitter is looking more and more like plumbing, and plumbing is eternal.”); Steven Johnson, *How Twitter Will Change the Way We Live (In 140 Characters or Less)*, TIME MAG., June 15, 2009, at 32.

communication for their businesses.¹⁵⁰ Legislatures should foster this development by defining the scope of internet communication's use within the employment context, rather than following a piecemeal and inconsistent judiciary. The potential benefits of internet communications are still nascent, but the benefits are already immeasurable. David Carr explains how just one of these new forms of communication, Twitter, is "an always-on data stream from really bright people in their respective fields, whose tweets are often full of links to incredibly vital, timely information."¹⁵¹ Similarly, blogs allow legal experts to post their thoughts on current legal issues for all to see and share in the discourse.¹⁵² Internet communication has helped establish a "cohesive social community,"¹⁵³ a goal that our legislatures should find worthwhile. State legislatures protect off-duty smoking in a majority of states, and there is no powerful justification to preclude this right to internet activity; it is not a health detriment and it positively impacts our society.¹⁵⁴ In contrast to tobacco use, internet communication is a socially valuable practice which state legislatures should encourage. State legislatures have the power to shape statutes which account for employers' interests in maintaining a well-functioning business, while also providing the degree of privacy for internet communication that society deems reasonable.

While employers opposed to regulation argue that such regulations strain employer autonomy by forcing them to incur more costs, this argument is exaggerated. Legislation already protects a majority of smokers from employment termination, and smoking may be the riskiest off-duty activity that is likely to increase health care costs.¹⁵⁵ There is no clear showing that

¹⁵⁰ *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010) (citing Brief for New York Intellectual Property Law Association 22); Sam Hendren, *Ohio Companies Adopt Social Media Guidelines*, WOSU (Sept. 10, 2009), <http://www.publicbroadcasting.net/wosu/news.newsmain/article/0/1/1552898/WOSU.News/Ohio.Companies.Adopt.Social.Media.Guidelines> ("The company [(Longaberger)] has its own Facebook page as does company CEO Tami Longaberger. [Longaberger's spokesman] doesn't have exact figures, but he says those pages—and hundreds of other pages belonging to Longaberger representatives—are responsible for thousands of contacts. And he says that in the past six months the company's social media usage has grown exponentially. He says that between 60 and 75 employees devote at least part of their week to social media contacts. He says all employees with social media connectivity are encouraged to comment about their experience with the company in their free time."); *Social Networking Policy*, *supra* note 41; Wortham, *Facebook Friend*, *supra* note 43.

¹⁵¹ Carr, *supra* note 41.

¹⁵² See, e.g., SCOTUSBLOG, <http://www.scotusblog.com/> (last visited Feb. 3, 2011); see also THE VOLOKH CONSPIRACY, <http://www.volokh.com> (last visited Feb. 3, 2011).

¹⁵³ Gely & Bierman, *supra* note 25, at 329.

¹⁵⁴ See *id.* at 327.

¹⁵⁵ *Smoking and Tobacco Use*, CENTERS FOR DISEASE CONTROL & PREVENTION http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smokin

regulating off-duty activity is a cost-saving mechanism.¹⁵⁶ Although an employer is potentially liable for employee activities, even under these state statutory protections, an employer may terminate employment for legitimate business reasons. However, even if empirical studies displayed that off-duty protection statutes increase employer costs, it does not end the discourse on employee privacy. Society repeatedly imposes costs on employers to promote societal values,¹⁵⁷ and the New York legislature drafted a provision in its off-duty statute which allows employers to distinguish insurance costs for this purpose.¹⁵⁸ The self-interest of employers and their lobbying activities should not diminish legislation geared toward the majority of individuals. When an activity such as internet activity has no adverse effect on the employer or the employee's work ability, the law should protect the privacy of an employee.¹⁵⁹ The mere fact that technology has lessened the clear distinction between on-duty and off-duty activity is not sufficient to eliminate all off-duty protections. With increased technology, privacy is even more important when it does not conflict with work activities.¹⁶⁰

Off-duty protection statutes serve an important societal value that the legislatures should support. These statutes do not shackle the employer; they only limit monitoring to an employee's conduct that affects work. The benefits of internet activity are indisputable, and legislation should help mine the effectiveness of this incredible resource. At-will employment has eroded, and it is clear the marketplace is not the best method of protecting employees. Legislatures should expand upon previous limits to at-will employment by ensuring broader off-duty protection, especially in the Internet context.

VI. PROPOSED SOLUTIONS

There are many potential routes to solve the problem of adverse employment actions on account of off-duty internet activity. Although the language of the statutes in Colorado, North Dakota, California, and New

g/index.htm (last updated Mar. 21, 2011). The effect of smoking causes approximately one in every five deaths and accounts for 90% of all lung cancer deaths in men. *Id.*

¹⁵⁶ NAT'L WORKRIGHTS INST., *supra* note 111.

¹⁵⁷ Finkin, *Life Away From Work*, *supra* note 118, at 962.

¹⁵⁸ N.Y. LAB. LAW § 201-d (McKinney 2009). The model act, which this Note proposes, incorporates this language from the New York statute. *See infra* Part VI.B.

¹⁵⁹ Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 683 (2004).

¹⁶⁰ Finkin, *Life Away From Work*, *supra* note 118, at 955 ("It does not follow that because . . . work at home has or may become commonplace, the employer may therefore dictate what soft-drink the employee may consume . . .").

York appear on their face to protect this activity, the courts have removed this protection. Therefore, the legislatures should address this issue and allow the American labor force to effectively use the modern benefits of blogging and social networking.

A. Federal Legislation

One method of creating off-duty protection for employees is federal legislation codifying uniform off-duty protection. A federal statute would provide a clear indication from Congress of the importance of protecting electronic communication, and would not subject employers to a variety of state statutes and judicial interpretations.¹⁶¹ In the example of David Becker's blog while employed by Vinson & Elkins, it would greatly benefit large employers such as this if their employee off-duty policies were uniform.¹⁶² Currently, large employers must address an array of ambiguous statutes that are continually evolving through the state judiciaries.¹⁶³ State statutes,¹⁶⁴ federal statutes,¹⁶⁵ and even many judicial opinions¹⁶⁶ are moving more toward granting privacy rights for off-duty conduct, especially in the context of electronic communication. Congress could streamline this movement with a statute, which adequately balances competing views. A democratically-crafted federal statute would benefit from the input of the Nation's most interested parties, rather than be dominated by the biases of state, or even city, legislatures.

Despite the benefits of uniform legislation, many are leary of relying on Congress.¹⁶⁷ Congress is plagued with aggressively partisan politics and

¹⁶¹ Rives, *supra* note 35, at 564; *see also* Kirkland, *supra* note 30, at 566–68.

¹⁶² *See* Pauline Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133–34 (1997) (illustrating that employees overestimate their legal protection, which is nearly non-existent in an at-will regime); Laura B. Pincus & Clayton Trotter, *The Disparity Between Public and Private Sector Employee Privacy Protections: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 AM. BUS. L.J. 51, 55 (1995) (explaining that the problem is exacerbated because many employees believe they have a privacy right where this privacy protection is non-existent).

¹⁶³ This would most likely be difficult for employers facing diversity actions in federal court where cases may hinge on which state law applies. *See* 28 U.S.C. § 1332 (2006).

¹⁶⁴ CAL. LAB. CODE § 96(k) (West 2003); COLO. REV. STAT. § 24-34-402.5 (2010); N.Y. LAB. LAW § 201-d (McKinney 2009); N.D. CENT. CODE § 14-02.4-03 (2009).

¹⁶⁵ *See, e.g.*, Employee Polygraph Protection Act, 29 U.S.C. § 2002 (2006).

¹⁶⁶ *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 893 (9th Cir. 2008) (holding SWAT team employees have an expectation of privacy for text messages on their employer-provided pager).

¹⁶⁷ Hong, *supra* note 44, at 475–76.

many pressing issues, which will take precedence over off-duty employee protection.¹⁶⁸ One may argue that incremental change through state legislatures is more practical because it has already made progress.¹⁶⁹ Some statutes are best fit for state legislatures because they can serve as laboratories for democracy, crafting alternative methods of off-duty protections and varying enforcement mechanisms.¹⁷⁰ State legislation allows employers and employees to gradually adapt to the varying statutory schemes, causing these competing groups to gravitate toward the state that best balances both of their needs and ideologies.¹⁷¹

The arguments for state over federal legislation have merit, but federal legislation will undoubtedly create the most uniform legislation. In order to combine the benefit of uniformity and retain the flexibility of the states, there should be a model state statute for states to enact. A model act would ensure consistency and allow states to modify a statute to address their specific needs.

B. Model State Statute

Among the five off-duty protection statutes currently enacted, none adequately address the realities of modern internet communication and the need to protect this crucial form of communication.¹⁷² In the states that have provided some protection, the statutes have significant differences, which may either overburden employers or not adequately protect employees.¹⁷³

¹⁶⁸ Frank Rich, Op-Ed., *The State of the Union Is Comatose*, N.Y. TIMES, Jan. 31, 2010, at WK10 (“[W]e will soon enter the fourth decade in which Congress—and therefore government as a whole—has failed to deal with any major national problem, from infrastructure to education. The gridlock isn’t only a function of polarized politics and special interests. There’s also been a gaping leadership deficit.”). See generally Robert Pear & David Herszenhorn, *Health Care Vote Illustrates Partisan Divide*, N.Y. TIMES (July 16, 2009), <http://www.nytimes.com/2009/07/16/us/politics/16health.html>.

¹⁶⁹ Hong, *supra* note 44, at 475.

¹⁷⁰ *Id.*; see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹⁷¹ Hong, *supra* note 44, at 476.

¹⁷² Rives, *supra* note 35, at 564; *Legislative Briefing Kit: Lifestyle Discrimination in the Workplace*, AM. CIV. LIBERTIES UNION (Dec. 31, 1998), http://www.aclu.org/racial-justice_womens-rights/legislative-briefing-kit-lifestyle-discrimination-workplace#model; *Blogger’s FAQ*, *supra* note 44 (“[I]f you work for a private employer and you have no union contract or other agreement that provides you with additional protections, you are considered an ‘at will’ employee and the employer may fire you for any reason that is not specifically prohibited by law.”).

¹⁷³ See Gely & Bierman, *supra* note 25, at 320–22.

While it is beneficial for states to adopt variations of statutes and serve as laboratories of democracy,¹⁷⁴ such divergent views on enforcement, remedies, and exception clauses burden large employers and preclude consistent statutory interpretation.¹⁷⁵ The benefit of a model act is that while creating consistency, it also allows for the flexibility of states to adjust it to adequately address their unique qualities.¹⁷⁶ Similar to the successes of comprehensive acts such as the Uniform Commercial Code, a model act that addresses employment, the foundation of the United States economy, will increase consistency in employment practices.¹⁷⁷ This Note proposes the drafting and subsequent adoption of the following uniform act. This off-duty protection statute combines and elaborates upon various sections of the five existing off-duty protection statutes. This model act sufficiently balances both employer and employee interests, and adequately addresses the increase of internet communication. The statute this Note proposes is as follows:

- I. It is discriminatory for any employer to:
 - (i) discharge or discriminate against an employee with respect to any compensation, term, privilege, or condition of employment because of:
 - (a) lawful conduct during non-work hours, away from the employer's premises, including but not limited to sports, games, hobbies, exercise, reading, writing, blogging, social networking, viewing television, movies, and similar material; or
 - (b) exercise of employee rights guaranteed by the First Amendment of the United States Constitution.
 - (ii) Unless such a restriction:
 - (a) furthers a bona fide occupational requirement;
 - (b) reasonably relates to the employment activities and responsibilities of a particular employee or particular group of employees, rather than to all employees of the employer;

¹⁷⁴ *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting).

¹⁷⁵ See Gely & Bierman, *supra* note 25, at 320–22.

¹⁷⁶ *About the ULC*, UNIFORM L. COMMISSION: NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS, [http://www.nccusl.org/Narrative.aspx?title=About the ULC](http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC) (last visited Apr. 18, 2011).

¹⁷⁷ *Id.* ("The work of the Conference simplifies the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. Representing both state government and the legal profession, it has sought to bring uniformity to the divergent legal traditions of more than 50 sovereign jurisdictions, and has done so with significant success.").

- (c) is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest; or
 - (d) directly addresses a potentially substantial interference with the working relationship between the employee and employer.
- II. Nothing in this section shall prohibit an employer from offering, imposing or having in effect an insurance policy that distinguishes between employees for the type of coverage or the price of coverage based upon the employees' off-duty activities, provided that differential premium rates charged employees reflect a differential cost to the employer and that employers provide employees with a statement delineating the differential rates used by the carriers providing insurance for the employer, and provided further that such distinctions in type or price of coverage shall not be utilized to expand, limit, or curtail the rights or liabilities of any party with regard to a civil cause of action.
- III. Where a violation of this section is alleged to have occurred, the aggrieved party may:
 - (i) bring a civil action for equitable relief and damages, but the filing of a claim does not relieve a person from the obligation to mitigate damages; or
 - (ii) submit the proceeding to a private or public mediation program.
- IV. In a civil action for damages:
 - (i) a court shall not grant punitive damages; and
 - (ii) if the prevailing party in the civil action is the plaintiff, the court shall award the plaintiff court costs and attorneys' fees unless the plaintiff is an employee of a business that has or had 15 or fewer employees during each of 20 or more calendar work weeks in the current or preceding calendar year.
- V. The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.

C. Model Act Analysis

In order to explain the rationale behind this model act, this Note will illustrate the underlying reasons of each section and how it differs from the

current off-duty statutes. First, the beginning of Section I has a very expansive definition modeled after the North Dakota statute.¹⁷⁸ This broad language is more beneficial to employees than the narrower Colorado statute, which is only triggered by employment termination.¹⁷⁹ However, in order to balance employer interests, this model act is not quite as broad as North Dakota's or New York's,¹⁸⁰ because this statute is not applicable to an employer who considers off-duty activities with respect to applications or hiring. The language of this model act attempts to balance these employer and employee interests. It protects employees from adverse action beyond termination, such as promotion or compensation, while not limiting employers' investigations of off-duty activities when hiring. The justification for treating termination and hiring differently is consistent with how our society views these two aspects of the employment relationship. Termination has been dubbed "capital punishment" in the employment context, and has a severe effect on employees.¹⁸¹ Conversely, during the hiring and application process, the employer has a strong incentive to be selective and is entitled to more deference to avoid offering employment to an undesirable employee. The employer's costs associated with training new employees are significant and should be limited.

The model act then explains the activities that would be unlawful for an employer to consider. Section I of this act combines the language of the California¹⁸² and New York statutes,¹⁸³ and supplements them with

¹⁷⁸ N.D. CENT. CODE § 14-02.4-03 (2009) ("It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment . . ."). Although the broad scope follows the purpose behind the North Dakota statute, the language more closely resembles the more simplified and sweeping language from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . .").

¹⁷⁹ COLO. REV. STAT. § 24-34-402.5 (2010).

¹⁸⁰ N.Y. LAB. LAW § 201-d (McKinney 2009) ("[I]t shall be unlawful for any employer or employment agency to refuse to *hire*, employ, or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment . . ." (emphasis added)). This also departs from the language of Title VII of the Civil Rights Act, which provides protection in the hiring process. 42 U.S.C. § 2000e-2.

¹⁸¹ ROTHSTEIN & LIEBMAN, *supra* note 20, at 866.

¹⁸² CAL. LAB. CODE § 96(k) (West 2003) ("[L]awful conduct occurring during nonworking hours away from the employer's premises.").

¹⁸³ N.Y. LAB. LAW § 201-d ("'Recreational activities' shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is

additional language to avoid the problems the New York courts confronted.¹⁸⁴ Addressing lawful conduct during non-work hours, and away from the employer's premises, confronts the gravamen of these statutes. This statute is not so broad as to force employers to tolerate internet blogging on employer-provided computers or blogging during work time.¹⁸⁵ In order to cure the ambiguity of these statutes, the model act provides an illustrative but non-exhaustive list of activities that are protected, including blogging and social networking. One problem with the New York statute is that courts have applied *noscitur a sociis* to exclude activities such as personal relationships,¹⁸⁶ picketing,¹⁸⁷ and potentially blogging.¹⁸⁸ To cure this problem, the model act not only explicitly adds blogging, social networking, and personal relationships, but it also includes writing. This is to ensure protection and account for new forms of internet communications that are likely to emerge such as Twitter, which do not fall directly within the confines of blogging or social networking.¹⁸⁹

generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material").

¹⁸⁴ *McCavitt v. Swiss Reins. Am. Corp.*, 237 F.3d 166, 169 (2d Cir. 2001) (McLaughlin, C.J., concurring).

¹⁸⁵ *See Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 904 (9th Cir. 2008). The issue of using employer provided equipment and expectations of privacy is a Fourth Amendment issue outside the scope of this Note. There is a growing debate concerning employers regulating employee internet behavior at work, but this Note only addresses off-duty activities. *See* Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379, 379-80 (2000). *See generally* Michael L. Rustad & Sandra R. Paulsson, *Monitoring Employee E-Mail and Internet Usage: Avoiding the Omniscient Electronic Sweatshop: Insights from Europe*, 7 U. PA. J. LAB. & EMP. L. 829 (2005).

¹⁸⁶ *McCavitt*, 237 F.3d at 166; *State v. Wal-Mart Stores Inc.*, 207 A.D.2d 150, 150 (NY. App. Div. 1995).

¹⁸⁷ *Kolb v. Camilleri*, No. 02-CV-0117A(Sr), 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008).

¹⁸⁸ *See* Lichtenstein & Darrow, *A Right to Blog*, *supra* note 29, at 16.

¹⁸⁹ Carr, *supra* note 41; Johnson, *supra* note 149. This Note only attempts to draft a model statute to solve the increasing problem of adverse treatment premised upon employee internet communication. There are many other possible activities, however, which a model act may seek to protect. For example, states may decide to add eating or cooking to the list of protected activities. This addition would protect employees from facing adverse employment action based on potentially harmful food they consume which increase potential health risks. *See* Francis P. Alvarez & Michael J. Soltis, *Workplace Wellness Meets Employment Law: Eat Your Veggies . . . Or Else*, CORP. COUNS., July 2005, at 5, 5. Similarly, a state may include "personal relationships" to avoid the interpretation from the New York courts. *McCavitt*, 237 F.3d at 168 (McLaughlin, J., concurring).

The second subset of this section is modeled after Connecticut's off-duty protection statute,¹⁹⁰ protecting employees from speech that would be protected under the United States' First Amendment and its employment law jurisprudence.¹⁹¹ This provision helps provide broader protection for speech, and the limits imposed on the First Amendment in the employment context do not unfairly inhibit employers. Consistent with Supreme Court jurisprudence, to warrant protection, an employee must speak on a matter of public concern,¹⁹² and the speech must not be work-related.¹⁹³ This added provision of the model act would protect, for example, an individual who decides to blog or tweet from an iPhone or Blackberry during lunch about a non-work-related matter of public concern. As individuals connect more frequently through internet communications, this protection should be afforded to encourage this networking during short breaks or lunch breaks from normal work hours.¹⁹⁴ Without this provision, this activity would not be protected under this act, because the activity is occurring on the work premises.

The last piece of section I of the model act seeks to balance employer interests by creating four broad exceptions to the employee privacy protections. The first three subsections are modeled after the exceptions from the Colorado statute, which allows exceptions for restrictions that are (1) a bona fide occupational requirement, (2) reasonably related to employment activities, and (3) necessary to avoid a conflict of interest.¹⁹⁵ The model act retains the broad language from the Colorado statute, which allows restriction not only to avoid a conflict of interest, but also to avoid the

¹⁹⁰ CONN. GEN. STAT. ANN. § 31-51q (West 2003) ("discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4, or 14 of article first of the Constitution of the state").

¹⁹¹ See *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563, 568 (1968).

¹⁹² *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 84 (2004); see also *Rankin v. McPherson*, 483 U.S. 378, 392 (1987).

¹⁹³ *Garcetti*, 547 U.S. at 426.

¹⁹⁴ See Jim Siegel, *Rules on Tweeting Don't Stop Legislators*, COLUMBUS DISPATCH, Jan. 28, 2010, at A1. Jim Siegel explains that during the 2010 State of the State speech in Ohio, state legislators tweeted from the House floor during the speech. With the constant changes with forms of communication, it is difficult for not only employers, but also the House and Senate to anticipate the potential outlets for electronic communication. For example, the United States Senate prohibits all electronic devices, while the House of Representatives does not prohibit tweeting. *Id.* ("Rep. Bob Latta, R-Bowling Green, occasionally Tweets from the chamber but did not do so during the State of the Union last night because he wanted to give President Barack Obama his 'undivided attention.'").

¹⁹⁵ COLO. REV. STAT. § 24-34-402.5 (2010).

appearance of a conflict.¹⁹⁶ This gives the employer latitude to implement policies to limit employee behavior and address the fears that employers have from these off-duty protection statutes.¹⁹⁷ The last employer exception to the statute is borrowed from the Connecticut statute,¹⁹⁸ and it allows the employer to implement restrictions to avoid a potentially substantial interference with a working relationship. This is a very broad escape hatch for employers. Although this exception raises the possibility of decreasing the effectiveness of this act, it helps balance competing interests and perhaps makes an adoption of this statute more likely in states averse to eroding at-will employment.¹⁹⁹

Section II of the model statute is based on New York's off-duty statute, which allows employers to account for added costs, which they would potentially incur with insurance premiums.²⁰⁰ Although the New York statute most likely contemplated off-duty tobacco use or unhealthy food as increasing insurance costs,²⁰¹ it is also possible that more liberal blogging or social networking policies could increase insurance premiums for sexual harassment insurance or similar insurance policies which would protect against defamation or fraud. By specifically allowing employers to adjust

¹⁹⁶ *Id.* This conflict-of-interest provision, however, is not too burdensome on employees. Even IBM has a conflict-of-interest exception in its employee off-duty privacy policy, and IBM is known to have one of the more employee-friendly policies, which protect off-duty behavior. *Rulon-Miller v. IBM Corp.*, 162 Cal. App. 3d 241, 250–51 (1984); ROTHSTEIN & LIEBMAN, *supra* note 20, at 667. Courts have also upheld the use of very liberal conflict of interest policies for newspapers, because it is essential for the employers to effectively conduct their business and retain their integrity. *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1129 (Wash. 1997).

¹⁹⁷ *Sonne, supra* note 119, at 185–88.

¹⁹⁸ CONN. GEN. STAT. ANN. § 31-51q (West 2003) (“provided such activity does not substantially or materially interfere with the employee’s bona fide job performance or the working relationship between the employee and the employer”).

¹⁹⁹ ROTHSTEIN & LIEBMAN, *supra* note 20, at 943. New York, for example, has not accepted the public policy exception to the at-will employment doctrine. *See, e.g., Murphy v. Am. Home Prod. Corp.*, 448 N.E.2d 86, 86 (N.Y. 1983).

²⁰⁰ N.Y. LAB. LAW § 201-d (McKinney 2009) (“Nothing in this section shall prohibit an organization or employer from offering, imposing or having in effect a health, disability or life insurance policy that makes distinctions between employers for the type of coverage or the price of coverage based upon the employees’ recreational activities”); *see Rives, supra* note 35, at 567 (“Although an employer could not, under the statute, use rising healthcare costs as the justification for prohibiting certain off-duty conduct, an employer would be able to adjust rates so long as they are actuarially justified”).

²⁰¹ *Rives, supra* note 35, at 566–67; *see e.g., City of North Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995) (City of North Miami sought to regulate off-duty smoking after it discovered that each smoking employee cost the city approximately \$4,611 per year).

insurance coverage and prices, the statute avoids distributing all the added costs of this statute to employers. Rising costs are the main criticism of these off-duty protection statutes, and this section assures that employers will retain their autonomy and not be discouraged from hiring employees.²⁰² Employees who take part in risky off-duty activities should not be barred from employment,²⁰³ but they should not force their employer to bear this excessive burden. This provision helps balance competing interests and makes states more likely to adopt this model act.

Section III of this model act addresses the enforcement mechanisms available to employees terminated in an alleged violation of this act. Unlike the Colorado statute, which only allows a civil suit for damages,²⁰⁴ this model act provides employees with more leeway. Similar to New York, this statute allows aggrieved parties to pursue equitable relief as well.²⁰⁵ However, this statute retains the provision from the Colorado statute, which proclaims that employees have a duty to mitigate their damages.²⁰⁶ This traditional contract doctrine assures that terminated employees will not solely rely on their termination suit for income but will seek other employment. This will help decrease damages for employers, and minimize employee reliance on this statute. Another way to aid employers in this costly litigation is to depart from the Connecticut statute by specifically precluding punitive damages under Section IV of the statute.²⁰⁷ Although this will limit the value of employee judgments and settlements, it will not allow an overzealous jury to hamstring a company. Not allowing punitive damages provides the benefit of discouraging aggressive plaintiff's attorneys who may be likely to pursue violations under this statute. Under a statute that allowed punitive damages, employers would be much more likely to settle for inflated amounts to avoid the fear of high punitive damages.²⁰⁸

²⁰² Rives, *supra* note 35, at 566 ("Although an employee's right to privacy must be respected, an employer's right to make a profit must be recognized as well.").

²⁰³ NAT'L WORKRIGHTS INST., *supra* note 111.

²⁰⁴ COLO. REV. STAT. § 24-34-402.5 (2010); Gely & Bierman, *supra* note 25, at 321 ("[T]he 'sole remedy' for aggrieved employees under its off-duty conduct provision is a civil suit in state court for lost wages and benefits . . .").

²⁰⁵ N.Y. LAB. LAW § 201-d.

²⁰⁶ COLO. REV. STAT. ANN. § 24-34-402.5.

²⁰⁷ CONN. GEN. STAT. ANN. § 31-51q (West 2003) ("shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages").

²⁰⁸ Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 170-71 (1998). This article cites Senator Orrin Hatch as he commented on the effect of punitive damages on legal settlements. *Punitive Damages in Financial Injury Cases, The RAND Report: Hearing Before the Comm. on the Judiciary*, 105th CONG. 1 (1997) (statement of Sen. Orrin G. Hatch) ("[E]xcessive punitive damage awards or unnecessary settlements ultimately are passed on to the consumer; in effect, to

Although the absence of punitive damages may reduce the incentives of filing a complaint, this act encourages suits by granting attorneys' fees and court costs to prevailing plaintiffs.²⁰⁹ As opposed to punitive damages, allowing attorneys' fees to a prevailing plaintiff encourages meritorious suits to progress because the party is confident in its claim. This is different from high punitive damage awards, where litigation is instigated more by the attorney than the client. The model act adopts the exception to this rule that Colorado uses, allowing certain small businesses with fifteen or fewer employees to be exempt from the attorney fees provision.²¹⁰ This decreases the burden on small employers who are more likely to encounter the added costs of this act, because it is more difficult to absorb the costs for small business owners.

The model act provides an alternative for the aggrieved party in Section III by allowing and encouraging the employee to submit the proceeding to mediation. Although no state off-duty statute specifically provides for alternative dispute resolution, the North Dakota statute is within the Human Rights Chapter, which encourages mediation as a means of resolving disputes.²¹¹ Mediation is increasingly an attractive alternative to litigation that many individuals prefer.²¹² Not only is mediation much less expensive for both parties, it is also much quicker, allowing employees and employers to avoid lengthy litigation.²¹³ The other benefit of mediation is that its flexibility allows parties to craft more creative strategies and become less adversarial.²¹⁴ This is especially important in the employment context where

each and every one of us as Americans in the form of higher prices for the products and services we buy. These costs create inflation, unemployment, and even harm our Nation's competitiveness in the global economy. Manufacturers and other businesses are often forced to discontinue products or scrap research and development projects out of fear of facing excessive punitive damage awards in court.”).

²⁰⁹ COLO. REV. STAT. ANN. § 24-34-402.5 (“If the prevailing party in the civil action is the plaintiff, the court shall award the plaintiff court costs and a reasonable attorney fee.”).

²¹⁰ *Id.* (“shall not apply to an employee of a business that has or had fifteen or fewer employees”).

²¹¹ N.D. CENT. CODE § 14-02.4-03 (2009); Gely & Bierman, *supra* note 25, at 321.

²¹² Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1983); see also STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 147–51 (5th ed. 2007).

²¹³ Riskin, *supra* note 212, at 34.

²¹⁴ Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 LAW & SOC. INQUIRY 715, 732 (1996) (“Through the recognition fostered in mediation, individuals will gain greater capacity to understand and communicate more effectively with others.”); Riskin, *supra* note 212, at 34 (“[Mediation] can educate the parties about each other’s needs and those of their

there are many factors aside from remedies that litigation cannot address, such as the employer providing reference letters, and creative ways to craft remedies with vacation days, sick days, and severance packages.²¹⁵ Even if the mediation fails and the parties continue toward litigation, the process has the potential to settle minor issues and make litigation less adversarial.²¹⁶ In avoiding the New York system of imposing fines on employers,²¹⁷ the model act encourages parties to resolve the situations themselves through mediation. Encouraging mediation and removing punitive damages will ideally make both parties less litigious and encourage an informed settlement negotiation, which helps avoid recurrences of similar causes of action.

The last section of the model act merely assures that employees will not be forced to waive their rights under this act to obtain employment.²¹⁸ Employers should not be allowed to waive the provisions of this statute, just as employers cannot condition employment upon waiving one's right to not be subject to sexual harassment in the workplace.²¹⁹ Although the employee agrees to the contract, the employee often has unequal bargaining power and is coerced into agreeing to waive his or her rights.

The model act this Note proposes is an amalgamation of the five current off-duty protection statutes. The most important aspect of this model statute, however, is that it specifically provides protection for off-duty blogging and social networking. No state currently has a statute addressing this increasing need, and, therefore, the states should consider a version of this act. Employer fears, which generate from codifying employee protections, are legitimate. However, this statute addresses those fears by balancing the employer's interests as well. The benefit of this model act is that as states consider adoption, they have the option to refine certain portions to address their state-specific needs.

community. Thus, it can help them learn to work together and to see that through cooperation both can make positive gains.”).

²¹⁵ GOLDBERG, SANDER, ROGERS & COLE, *supra* note 212, at 157 (“The fact that mediated outcomes may differ from those achieved in negotiation or at trial is consistent with the claim that mediation can produce creative outcomes reflective of the needs of parties.”).

²¹⁶ *Id.* at 154.

²¹⁷ N.Y. LAB. LAW § 201-d (McKinney 2009); Gely & Bierman, *supra* note 25, at 322.

²¹⁸ *Legislative Briefing Kit*, *supra* note 172.

²¹⁹ Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 482 (2001) (“[C]ontractual waivers both annul the ‘primary objective’ of avoiding harm established by employment statutes and invite the very conduct these laws were designed to stop.”).

VI. CONCLUSION

The increase in internet communication through blogging, social networking, and Twitter has dramatically changed the way individuals communicate and obtain information. This communication revolution is increasingly in conflict with the employment relationship. Despite the gradual erosions of at-will employment, it is still a powerful tool for private employers who have been limiting employee communication. Although there are five states with lifestyle protection statutes, the courts have significantly limited their effectiveness, rendering them meaningless for employees. Legislatures should adopt this Note's proposed model act to ensure the privacy of employees' off-duty conduct and encourage the growth and benefits of internet communication. The model act this Note proposes is not a watershed of employee rights, but rather a balance of employee and employer interests. Society will gradually move toward an employment system that embraces these innovations, but state legislatures should act to ensure that the transition is consistent, informed, and made by balancing competing interests.

